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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 249.

STATE LIBRARY

TOY TOY, APPELLANT,

vs.

C. B. HOPKINS, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF WASHINGTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

FILED MARCH 28, 1907.

(20,637.)

(20,637.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1907.

1 In the Circuit Court of the United States for the Western District of Washington.

No. 1480.

In the Matter of the Application of Toy Toy for a Writ of *Habeas Corpus*.

Petition.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Washington:

The petition of Toy Toy respectfully shows:—

That Toy Toy is unlawfully restrained of his liberty and imprisoned by one C. B. Hopkins, United States Marshal/ for the Western District of Washington, at the Penitentiary of the United States at McNeil's Island in said State and District. The cause of said restraint according to the best of the knowledge and belief of your petitioner is that the said C. B. Hopkins, United States Marshal as aforesaid, holds a commitment issued upon a judgment rendered by the Circuit Court of the United States for the District of Oregon, a copy of which commitment is hereto attached as part hereof, marked "Exhibit A." That said C. B. Hopkins, United States Marshal/ as aforesaid, as your petitioner is informed and verily believes has and holds an order from the Attorney General of the United States directing that your petitioner be transferred from the penitentiary of the State of Oregon to the said Penitentiary of the United States at said McNeil's Island aforesaid, where your petitioner is, as aforesaid, unlawfully imprisoned.

Your petitioner alleges and shows to your Honors that said restraint and imprisonment of your petitioner is unlawful and, as reasons why said restraint and imprisonment is unlawful, shows to your Honors, that on the 21st day of October, 1901, your petitioner was indicted by a Grand Jury of the United States Circuit Court sitting in and for the District of Oregon, for the murder of one Annie Edna, of which indictment a copy is hereto attached, marked "Exhibit B," and is made a part hereof; that thereafter your petitioner was arraigned upon said indictment and demurred to said indictment, which demurrer was by said Circuit Court of
2 the United States for the District of Oregon, overruled and denied, to which ruling of said Court your petitioner excepted. That thereafter your petitioner entered a plea of not guilty to the charge contained in said indictment and was placed upon trial in said Court on said charge before a jury of twelve men resident in said District of Oregon. That evidence was offered in said trial on behalf of the United States, and on behalf of your petitioner, and said jury, after hearing said evidence and the instructions of said court, returned into said Court a verdict finding your petitioner guilty of the murder of said Annie Edna as charged in said indict-

ment, without capital punishment. That upon said verdict the said Circuit Court of the United States for the District of Oregon rendered judgment sentencing your petitioner to be imprisoned in the penitentiary of the State of Oregon for the term of his natural life. That upon said judgment and sentence, the Clerk of said Circuit Court of the United States for the District of Oregon issued the commitment under which the said C. B. Hopkins, United States Marshal for the Western District of Washington, as aforesaid, now imprisons your petitioner, and a copy of which is shown in said exhibit A hereto attached.

Your petitioner further shows to your Honors and alleges that the said Circuit Court of the United States for the District of Oregon was at the time and in the matter of said indictment, arraignment, trial, judgment, and sentence of your petitioner wholly without jurisdiction in the premises, and was without jurisdiction of both the subject matter of said proceeding and of the person of your petitioner, and that the said indictment, arraignment, trial, conviction, judgment and sentence of your petitioner and the said commitment issued thereon, were and are, each and all, without jurisdiction, unauthorized by law, and wholly null and void. That the place where said Annie Edna was killed was a tract of land which had once been a part of the Umatilla Indian Reservation, in the State of Oregon, but that long prior to and at the time of the death of the said Annie Edna, the said tract of land had been allotted to one Tatzhammer and a patent for the said land had been duly issued to her, by the United States, as a member of the
3 Umatilla tribe of Indians. And that the said premises whereon said Annie Edna was killed, by reason of said allotment and patent, ceased to be Indian Country and ceased to be a part of the said Umatilla Indian Reservation in Oregon. That on the 16th day of September, 1899, your petitioner, who was prior thereto a member of the Umatilla Tribe of Indians, received an allotment of land from what had theretofore been a part of the Umatilla Indian Reservation in Oregon, and received from the United States a preliminary patent for said allotment, and by reason of said allotment and patent of land, and by virtue of the Act of Congress, approved Feb. 8, 1887, your petitioner became, and at the time of the killing of the said Annie Edna on the 24th day of August, 1900, was, and at all times since has been a citizen of the United States and of the State of Oregon, and subject to its laws.

Your petitioner further states that he was born within the territorial limits of the United States and that at the time of the killing of the said Annie Edna your petitioner had voluntarily taken up within the limits of the United States his residence separate and apart from the Umatilla Tribe of Indians and had adopted the habits of civilized life, and that for all of the reasons heretofore given the Act of Congress of March 3, 1885, is unconstitutional and void when applied to the facts herein set out.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said C. B. Hopkins commanding

him to have the body of your petitioner before your Honors at a time and place therein to be specified, to do and receive what shall then and there be determined by your Honors concerning him, together with the time and cause of the detention of said Toy Toy, and said writ, and that your petitioner may be restored to his liberty.

J. A. ROKES AND
CRANE & WOODBURN BROS.,
Attorneys for Petitioner.

4 In the Circuit Court of the United States for the District of Oregon.

No. 2699.

THE UNITED STATES
vs.
COLUMBIA GEORGE and TOY TOY.

For Violation of Section 5399, Revised Statutes, as Amended by Act of January 15, 1897.

THE UNITED STATES OF AMERICA, *District of Oregon, ss:*

The President of the United States to the Marshal of the District of Oregon, or to his Deputy; and to the Keeper of either of the Jails in our said District, Greeting:

Whereas, at the October Term of the above entitled Court Toy Toy was duly convicted of the crime of murder (without capital punishment) contrary to form of the Statute in such case made and provided, and against the peace and dignity of the United States of America, for which offence he hath this day been sentenced by our said Court and to be imprisoned in the Penitentiary of the State of Oregon and to be there kept at hard labor for the term of his natural life and to stand committed till this sentence be performed.

Now, this is to command you, the said Marshal or Deputy, to take and keep and safely deliver the said defendant into the custody of the Keeper or Warden in charge of said prison forthwith.

And, this is to command you, the said Keeper or Warden in charge of the said prison, to receive from the said Marshal or Deputy the said defendant, convicted and sentenced as aforesaid, and him keep and imprison in accordance with said sentence, or till he be otherwise discharged by law. Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Portland in said District this December 3, 1901.

[SEAL.] J. A. SLADEN, *Clerk*,
By G. H. MARSH,
Deputy Clerk.

(Exhibit A.)

RRED COPY

5 UNITED STATES OF AMERICA, *District of Oregon, ss:*

In obedience to the command of the within Warrant of Commitment I have conveyed the therein named Toy Toy to the Oregon Penitentiary, at Salem, Oregon, in said District, and him there committed to the custody of the Warden of said prison on the 5th day of December, 1901.

ZOETH HOUSER,
United States Marshal, District of Oregon,
By J. A. WILSON, *Deputy.*

6 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA
vs.
COLUMBIA GEORGE and TOY TOY.

Indictment. Violation Section 5399 as Amended by Act of January 15th, 1897.

DISTRICT OF OREGON, *ss:*

The Grand Jurors of the United States of America, chosen, selected and sworn within and for the District of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present:

That Columbia George, an Indian, and Toy Toy, an Indian, did on the 24th day of August, 1900, upon the Umatilla Indian Reservation, within the State and District of Oregon, purposely and of their deliberate and premeditated malice and aforethought kill and murder one Annie Edna, an Indian woman, by then and there administering to her the said Annie a lethal dose of poison, namely strychnine, from which said lethal dose of strychnine so administered by the said Columbia George and Toy Toy, Indians aforesaid, the said Annie Edna then and there died: Contrary to the form in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 21st day of October, 1901.

CHAS. E. LADD,
Foreman of U. S. Grand Jury.
JOHN H. HALL,
U. S. District Attorney.

Witnesses sworn and examined before the U. S. Grand Jury:
R, C. Hinton.
A. P. Woodward.
Jas. McElroy.
B. F. McElroy.
W. C. Cole.
Ula Sate.
Ed Brisbe.

Endorsed: A true Bill. Chas. E. Ladd Foreman U. S. Grand Jury. Filed October 22, 1901. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

(Exhibit B.)

7 STATE OF WASHINGTON, *Kings County, ss:*

F. T. Woodburn, being first duly sworn, on oath states that he is one of the attorneys for the within named petitioner, Toy Toy; that said Toy Toy is confined in the United States Pentitentiary on McNeil's Island in this State and District; that there is at said Pentitentiary no person authorized by law to administer oaths, and that for that reason it is impossible for the petitioner to verify the foregoing petition in person; that affiant has read the foregoing petition and knows the contents thereof, and that the allegations and averments of fact therein contained are true. So help him God.

F. T. WOODBURN.

Subscribed in my presence and sworn to before me this 20th day of December, 1906.

[Seal of the United States Circuit Court, Western District of Washington.]

R. M. HOPKINS,
Deputy Clerk U. S. Circuit Court.

8 Endorsed on the back: No. 1480. In the Matter of the application of Toy Toy for a writ of *Habeas Corpus* Petition Filed in the U. S. Circuit Court Western District of Washington Dec. 20, 1906. A. Reeves Ayres, Clerk R. M. Hopkins Dep. J. A. Rokes and Crane & Woodburn Bros., Attorneys for petitioner.

9 United States Circuit Court for the Western District of Washington.

No. 1480.

In the Matter of the Petition of Toy Toy for a Writ of *Habeas Corpus.*

Appearance.

To the Clerk of the Above Entitled Court:

You will please enter our appearance as Attorneys for petitioner in the above entitled cause; and service of all subsequent papers, except writs and process, may be made upon said Toy Toy, by leaving the same with

J. A. ROKES AND
CRANE & WOODBURN BROS.

Office Address: 319 New York Building, Seattle, Washington.

RED COPY

(Endorsed:) Appearance. Filed in the U. S. Circuit Court, Western Dist. of Washington, Dec. 20, 1906. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

10 In the Circuit Court of the United States for the Western District of Washington.

No. 1480.

In the Matter of the Application of TOY TOY for a Writ of *Habeas Corpus.*

Motion.

Based upon the affidavit of F. T. Woodburn filed herewith the above named petitioner moves this Honorable Court to permit him to prosecute this proceeding as a poor person without the payment of costs.

J. A. ROKES AND
CRANE & WOODBURN BROS.,
Attorneys for petitioner.

11 In the Circuit Court of the United States for the Western District of Washington.

No. 1480.

In the Matter of the Application of TOY TOY for a Writ of *Habeas Corpus.*

Affidavit.

STATE OF WASHINGTON, *County of King, ss:*

I, F. T. Woodburn of lawful age do solemnly swear that I am one of the attorneys for the petitioner above named; that he has received an allotment from the United States as a Umatilla Indian of eighty acres of land in the State of Oregon but since he has been confined to the Penitentiary, the United States authorities have refused to allow him to transact any business concerning the same and he has received no benefits therefrom and is absolutely impecunious and has no money or property of any kind and has no means whereby he can procure funds; that his attorneys and each of them are acting wholly without compensation except what they may be able to procure should he be set at liberty and restored to his rights upon said allotment; that no one connected with this case or interested in the same has any funds or property with which to pay costs. For which reason I make this affidavit and ask the Court for an order that this matter may be prosecuted without the payment of costs.

F. T. WOODBURN.

Sworn to and subscribed before me this 20th day of December, 1906.

[Seal of the United States Circuit Court, Western District of Washington.]

R. M. HOPKINS,
Deputy Clerk of the United States Circuit Court.

(Endorsed:) Motion; with Affidavit attached. Filed in the U. S. Circuit Court, Western Dist. of Washington, Dec. 20, 1906. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

12 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

1480.

In the Matter of the Application of Toy Toy for Writ of *Habeas Corpus.*

Order Denying Writ.

Now on this 20th day of December, 1906, this cause comes before the Court upon the petition of the petitioner for a Writ of *Habeas Corpus* to be issued as prayed for in said petition, which petition is denied by the Court, to which ruling of the Court, the petitioner excepts and his exception is allowed.

C. H. HANFORD, *Judge.*

Endorsed on back: 1480. In the United States Circuit Court for the Western District of Washington. *In re* Petition of Toy Toy for a Writ of *Habeas Corpus.* Order denying Writ. Filed in the U. S. Circuit Court Western Dist. of Washington Dec. 20 1906. A. Reeves Ayres, Clerk. A. N. Moore Dep.

13 In the Circuit Court of the United States for the Western District of Washington.

No. 1480.

In the Matter of the Application of Toy Toy for Writ of *Habeas Corpus.*

Petition for Appeal.

To the Honorable C. H. Hanford, District Judge and one of the Judges of the above named court presiding therein:

The above named petitioner, Toy Toy, conceives himself aggrieved by the order of said court made and entered therein under date of December 20, 1906, wherein and whereby the petition of the above

named Toy Toy for a writ of *habeas corpus* was denied and wherein and whereby it was ordered concerning the application of this petitioner for a writ of *habeas corpus*, as follows: "which petition is denied by the court," and petitioner prays that this his petition for appeal may be allowed and that a transcript of the record proceedings and papers upon which said order was made duly authenticated may be sent to the United States Supreme Court. Dated Feb. 27, 1907.

J. A. ROKES AND
CRANE & WOODBURN BROS.,
Attorneys for Petitioner.

The foregoing petition for appeal is granted and the claim for appeal therein made is allowed.

C. H. HANFORD,
District Judge and One of the Judges of the Said United States Circuit Court, Presiding.

Dated February 28th, 1907.

14 In the Circuit Court of the United States for the Western District of Washington.

No. 1480.

In the Matter of the Application of Toy Toy for Writ of *Habeas Corpus.*

To C. B. Hopkins, United States Marshall for the Western District of Washington:

You are hereby notified that a petition for appeal, a copy of which is hereto annexed, has been filed in the office of the Clerk of the Circuit Court of the United States for the Western District of Washington, and that said petition will be heard in *in* said court at 10 o'clock, a. m., of the 4th day of March, 1907, or as soon thereafter as counsel can be heard.

J. A. ROKES AND
CRANE & WOODBURN BROS.,
Attorneys for Petitioner.

I hereby accept service of the above notice and -knowledge receipt of a copy of said notice with copy of petition attached this 27 day of February, 1907.

C. B. HOPKINS,
United States Marshall for the Western District of Washington.
By JOHN STRINGER, *Deputy.*

(Endorsed:) Petition for Appeal. Filed in the U. S. Circuit Court, Western Dist. of Washington. Feb. 27, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

15 In the Circuit Court of the United States for the Western District of Washington.

No. 1480.

In the Matter of the Application of Toy Toy for a Writ of *Habeas Corpus.*

Assignment of Errors on Appeal.

Comes now the petitioner above named and files the following assignment of errors upon which he will rely on his appeal from the order of this Honorable Court made on the 27th day of April, 1906, in the above entitled matter.

I. The court erred in denying the petition of said demurrer for a writ of *habeas corpus.*

II. The court erred in neglecting and refusing to issue an order to the said C. B. Hopkins to show cause why said petition for a writ of *habeas corpus* should not be allowed.

III. The court erred in failing, neglecting and refusing to issue a writ of *habeas corpus* as prayed for in said petition.

IV. The court erred in failing, neglecting and refusing to discharge petitioner from the unlawful imprisonment alleged in the said petition for a writ of *habeas corpus.*

J. A. ROKES AND
CRANE & WOODBURN BROS.,
Attorneys for Petitioner, Toy Toy.

(Endorsed:) Assignment of Errors on Appeal. Filed in the U. S. Circuit Court, Western Dist. of Washington, Mar. 4, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

16 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1480.

In the Matter of the Application of Toy Toy for a Writ of *Habeas Corpus.*

Præcipe.

To the Clerk of said Court:

Please issue for filing in the Supreme Court of the United States a duly authenticated transcript of the record, proceedings and papers in the above entitled cause, including therein the petition for writ of *habeas corpus,* order denying writ, petition for appeal, notice of hearing of the same and acknowledgment of service thereof, order allowing appeal and assignment of errors on appeal.

CRANE & WOODBURN BROS. AND
J. A. ROKES,
Attorneys for Petitioner.

ED COPY

Endorsed: Præcipe. Filed in the U. S. Circuit Court, Western Dist. of Washington, Mar. 5, 1907. A. Reeves Ayres, Clerk, R. M. Hopkins, Dep. Crane & Woodburn Bros. and J. A. Rokes, Attorneys for Petitioner.

17 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1480.

In the Matter of the Application of Toy Toy for a Writ of *Habeas Corpus*.

Certificate.

United States of America,
Western District of Washington, ss:

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the Western District of Washington, hereby certify the foregoing 16 pages, numbered from 1 to 16, inclusive, to be a full, true and complete transcript of the record in the above and foregoing entitled cause and Court, and that it contains true copies of all pleadings, motions and all other papers as the same remain on file in my office at Seattle, in said District, together with all rulings and orders of the said Court, the exceptions thereto and the allowance of such exceptions; and that the same constitutes the record on appeal from the Circuit Court of the United States for the Western District of Washington, to the Supreme Court of the United States. I further certify that the cost of preparing and certifying the said transcript is the sum of Seven and 80/100 Dollars, $7.80., which sum will be included in my account for fees against the United States, as Clerk, for the Quarter ending March 31, 1907, for the reason that the appeal herein allowed is prosecuted *in forma pauperis*.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at Seattle, this 7th day of March, 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

18 [Endorsed:] No. 1480. In the Circuit Court of the United States for the Western District of Washington. In the Matter of Toy Toy for Writ of *Habeas Corpus*. Appeal to Supreme Court of the United States. Transcript of the Record on Appeal.

Endorsed on cover: File No. 20,637. W. Washington C. C. U. S. Term No. 266. Toy Toy, appellant, *vs.* C. B. Hopkins, United States marshal for the western district of Washington. Filed March 28th, 1907. File No. 20,637.

Supreme Court, U. S.
FILED
MAR 26 1908
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF TOY TOY FOR A WRIT OF HABEAS CORPUS. } NO. 49.

BRIEF OF PETITIONER.

F. T. WOODBURN,
AND A. E. CRANE,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF TOY TOY FOR A WRIT OF HABEAS CORPUS. } NO. 266.

BRIEF OF PETITIONER.

STATEMENT OF FACTS.

On October 21, 1901, your petitioner, Toy Toy, was indicted by a grand jury of the United States Circuit Court sitting in and for the state of Oregon for the murder of Annie Edna. It was alleged in the indictment that Toy Toy, an Indian, on August 24, 1900, did kill and murder Annie Edna, an Indian woman, upon the Umatilla Indian Reservation in the state of Oregon. (Rec. p. 4).

Thereafter your petitioner was tried upon said indictment and by a jury found guilty of murder, without capital punishment. Upon said verdict, the said Circuit Court of the District of Oregon rendered judgment sentencing your petitioner to be imprisoned in the penitentiary of Oregon for his natural life, and your

petitioner is now confined under said judgment and sentence in the federal prison at McNeils Island in the state of Washington. (Rec. p. 3).

Prior to March, 3, 1885, there was living in the state of Oregon a tribe of Indians known as the Umatillas and your petitioner was a member thereof. Congress, by the Act of March 3, 1885 (23 Stat. 340), authorized the allotment of land in severalty to the members of said tribe.

In the year 1893, the allotments in severalty to the several members of said tribe, including your petitioner and the said Annie Edna, were completed and submitted to the Secretary of the Interior for his approval, but were not approved by him until September 16, 1899. (Rec. pp. 1, 2).

Since that time, the members of said tribe have been living upon their allotments and have put on the habits of civilized life. (Rec. pp. 1, 2). At the time the offense charged was committed, your petitioner had received his preliminary patent for his allotment of land upon said reservation and was in control thereof. Annie Edna had also received a preliminary patent for her allotment of land upon said reservation and was living upon the same. (Rec. pp. 1, 2). Annie Edna took the poison, if any was taken, and died upon her said allotment. (Rec. pp. 1, 2).

By reason of said allotment of land to your petitioner

and to the said Annie Edna, each became citizens of the United States and of the state of Oregon and subject to the laws, both civil and criminal, of said state and the land so allotted ceased to be a part of the said Indian reservation.

It is alleged in the petition herein that, by reason of the foregoing facts, the Circuit Court of the United States for the District of Oregon had no jurisdiction to render the judgment and sentence referred to therein and that the judgment, sentence and commitment are void. (Rec. p. 2).

On December 20, 1906, your petitioner filed his petition for a writ of habeas corpus in the United States Circuit Court, Western Division, of Washington and on the same day said Court denied the same. (Rec. p. 7). Thereafter, on the same day, your petitioner filed his petition asking to be allowed to appeal to this Court from said decision, which petition was granted on February 28, 1907. (Rec. pp. 7, 8).

ASSIGNMENTS OF ERROR.

I.

The Court erred in denying the petition for a writ of habeas corpus.

II.

The Court erred in neglecting and refusing to issue an order to the said C. B. Hopkins to show cause why said petition for a writ of habeas corpus should not be allowed.

III.

The Court erred in failing, neglecting and refusing to issue a writ of habeas corpus as prayed for in said petition.

IV.

The Court erred in failing, neglecting and refusing to discharge your petitioner from the unlawful imprisonment alleged in the said petition for a writ of habeas corpus. (Rec. p. 9).

BRIEF OF ARGUMENT.

FEDERAL COURTS HAVE NO JURISDICTION OF OFFENSES COMMITTED BY CITIZEN INDIANS.

The petitioner in this case was prosecuted under and by virtue of the provisions of an Act of Congress of March 3, 1885, (c. 341, 23 Stat. 385) which makes it a violation of the federal law for one Indian to murder another upon an Indian reservation within a state.

In the case of the United States v. Kagama, 118 U. S. 375, this Court held the aforesaid Act of Congress constitutional when applied to a tribal Indian. In said case, on page 383, this Court said that:

"The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for the residence of the tribe of Indians by the United States, and the inference is that the offending Indian shall belong to that or some other tribe."

In the case of State v. Smokalen, 79 Pac. 603, it is said:

"An examination of the entire legislation of Congress in relation to the Indian country shows that the general goverment has dealt with the Indian tribes only, and not with the individual who has severed his relations and assumed the habits and customs of the whites. . . . . All the cases to which we are cited, state and federal, deal with tribal Indians only, and we think the act in question must be restricted to these."

In the case of the United States v. Thomas, 151 U. S. 585, this Court said:

"Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation."

In the case of State v. Campbell, 55 N. W. 553, it is said:

"Unless otherwise provided by treaty with an Indian tribe, or by admitting the state into the Union, the criminal laws of the state, except so far as restricted by the authority of Congress 'To regulate commerce with Indian tribes' extend to all crimes committed on a reservation by persons other than tribal Indians." And again on page 555, supra, the Court said: "The jurisdiction of the Federal Goverment over these Indian tribes rests, not upon the ownership of any sovereignty over the country in which they reside, but upon the fact that, as wards of the general government, they are the subjects of Federal authority within the state."

The constitution of the United States and all of the decisions of this Court are to the effect that the Indian must be a tribal Indian before Congress can exercise jurisdiction over him.

If the petitioner was a citizen of the United States and of the state of Oregon at the time of the commission of the offense charged in the indictment, the Act of Congress under which the prosecution was had was unconstitutional and void as attempting to usurp the police powers of the state. The case of In re Heff, 197 U. S. 488, is decisive of this contention.

It is admitted that the petitioner was born within

the territorial limits of the United States and that, prior to the commission of said offense, the petitioner and Annie Edna had received allotments of land in severalty upon the Umatilla Reservation in the state of Oregon and that preliminary patents had been issued therefor to each of them. (Rec. p. 2). The petitioner, having taken an allotment of land in severalty and the preliminary patent having been issued therefor, was a citizen of the United States and of the state of Oregon by virtue of the Act of Congress of February 8, 1887.

The said Act of Congress, so far as it is applicable to the case at bar is as follows:

"And every Indian born within the territoral limits of the United States, to whom allotments shall have been made under the provisions of this act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntraily taken up, within said limits, his residence seperate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens"

All of the courts that have construed the foregoing provisions of said Act of Congress have held that an Indian, who has taken an allotment of land in severalty and to whom the preliminary patent has been issued therefor, is a citizen of the United States and of the state in which he resides.

The cases below cited are decisive of this question.

In re Heff, 197 U. S. 488.

In re Now-Ge-Zhuck, 76 Pac. 877.

United States v. Ricket, 106 Fed. 5.

Farrell v. United States, 110 Fed. 942, 947.

State ex rel Crawford v. Norris, 37 Neb. 299.

In Boyd v. Nebraska, 143 U. S. 155, this Court said:

"The Act of Congress approved February 8, 1887, (24 Stat. at L. 388, c. 110) was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States."

In the case of Guyatt v. Kautz, 83 Pac. 9, 12, it is said:

"Indians who have received allotments under any other Act of Congress are citizens."

If the petitioner was a citizen of the United States and of the state of Oregon, the said Circuit Court had no jurisdiction of the person of the petitioner or of the subject-matter of the action and the judgment, sentence and commitment of said Court are void.

The following authorities are in point and are, we think, decisive of this question.

In the case of State v. Smokalen, 79 Pac. 603, it is said:

"The Puyallup Indian Reservation having been abandoned, the lands allotted to the Indians in severalty, and the tribe having abandoned its tribal organization, laws, habits and customs, and the only parcel

of reservation land retained by the government being such as was used for school purposes, a homicide committed by one of such Indians on another within the territory embraced in the reservation was punishable by the state courts and was not within the Act of Congress, March 3, 1885, c. 341, 23 Stat. 385, providing that a state court should have no jurisdiction of the person of the accused or of the offense committed by one Indian against another in an Indian reservation."

The substance of the decision in the case of In re Now-ge-zhuck, 76 Pac, 877, is that the Act of Congress of Feb. 8, 1887, c. 119, 24 Stat. 388, allotting lands, constituting an Indian reservation, to the Indians etc., confers jurisdiction on the state courts to try and punish an allottee for any violation of the laws of the state.

In the case of In re Heff, 197 U. S. 488, this court, in the opinion on page 509 said.

"We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefits of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress."

NO JURISDICTION OF TERRITORY.

The Act of Congress of March 3, 1885, applies only when the crime is committed by a tribal Indian and when the offense is committed on an Indian Reservation.

To sustain an indictment under the aforesaid act,

it is necessary to prove that the defendant at the time of the commission of the offense was a tribal Indian and that the crime was committed upon an Indian Reservation. The Umatilla Indian Reservation had been allotted in severalty to the members of the tribe at the time of the commission of the offense and it was not an Indian Reservation and the Circuit Court had no jurisdiction for that reason. An Indian Reservation has been defined as follows:

"An Indian Reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians."

Forty-three Cases Brandy, 14 Fed. 539.

In United States v. Kagama, 118 U. S. 383, supra, in the opinion it is said:

"The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a Reservation, set apart within the state for the residence of the tribe of Indians by the United States, and the inference is that the offending Indian shall belong to some other tribe."

Upon the completion of the allotments the land became the property of the allottees and was no longer a part of the public domain set apart for the use and occupation of the Umatilla tribe of Indians. The allottees are the equitable owners of the land alloted to them. The naked legal title being held by the United States in trust for them.

In the case of the United States v. Richert, 106

Fed. 1, 6, in the opinion the Court said:

"The Indians mentioned in the bill occupy about the same relation with reference to the United States and the state of South Dakota as do settlers upon the public lands of the United States, who have entered and paid for their land, and done everything that is required to be done by the laws of the United States to give them title to the land upon which they reside; the naked legal title, simply, remaining in the United States."

Upon the completion of the allotments to the said tribe of Indians the reservation became extinct and the Indians themselves passed under the jurisdiction of the laws, both civil and criminal, of the state of Oregon.

In Draper v. United States, 164 U. S. 240, 246, in the opinion it is said:

"From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian land would become essential to prevent any implication of the state to frustrate the limitations imposed by the laws of the United States upon the title of land once in an Indian Reservation, but WHICH HAS BECOME EXTINCT BY ALLOTMENT IN SEVERALTY, and in which contingency the Indians themselves would have passed under the authority and control of the state."

When the Indians became citizens of the United States and of the state of Oregon, Congress lost all

jurisdiction of the territory once occupied by them as a reservation and only had such jurisdiction over said territory as was reserved to it by the Act of Congress of February 8, 1887.

In the case of State v. Campbell, 55 N. W. Rep. 553, 555, in the opinion it is said:

"The jurisdiction of the Federal Government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, BUT UPON THE FACT THAT, AS WARDS OF THE GENERAL GOVERNMENT, THEY ARE THE SUBJECTS OF FEDERAL AUTHORITY WITHIN THE STATE."

A homicide committed by one Indian on another in the territory previously embraced in the Puyallup Indian Reservation was held triable in the state courts, and not within the Act of Congress of March 3, 1885, c. 341. 9. 23 Stat. 385.

State v. Smokalen, 79 Pac. 603.

A Void Judgment May Be Impeached In A Collateral Action.

If the judgment, sentence and commitment of said Circuit Court are void because the said Court had no jurisdiction of the person of this petitioner or of the subject-matter of the action, can the record thereof be impeached? We think it can.

The principle that a record of a judgment cannot be impeached by pleading is not applicable where there is want of jurisdiction. The want of it makes a record void and unavailable for any purpose. The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced or when any benefit is claimed under it. Upon principle it would seem that the operation of every judgment must depend on the power of the Court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined.

When a Court acts without authority its judgment and orders are regarded as nullities. They form no bar to a remedy sought in opposition to them even prior to reversal. The jurisdiction of any Court, exercising authority over a subject, may be inquired into when the proceedings of the former are relied upon. When a Court assumes to act where it has no jurisdiction, its adjudications would be utterly void as an estoppel.

A Court gets its jurisdiction from the sovereign authority which organizes it. Jurisdiction cannot be conferred by the agreement or the acts of the parties, nor by estoppel. A judgment rendered by a Court without jurisdiction is waste paper and may be collaterally attacked in any action in which it is drawn in question.

We will now call attention to several cases in which judgments have been collaterally impeached.

In the case of In re Heff, 197 U. S. 488, this Court held that the United States District Court in and for the State of Kansas had no jurisdiction to try a white man for a sale of liquor to an Indian because the Indian had taken an allotment of land in severalty and had thereby become a citizen of the United States and not a subject of the police regulations of Congress.

The Act of Congress of March 3, 1885, is clearly a police regulation and when applied to the commission of a homicide within a state by a citizen, it is unconstitutional and void.

If the judgment in one case could be impeached in a collateral proceeding why not in the other?

Narciso Basso, a citizen of Porto Rico, brought an action against the United States in the Court of Claims to recover a fine he had paid by reason of his having been prosecuted and convicted under an Act of Congress making it a crime for a person within the United States to do the acts charged against him in the in-

dictment which Act of Congress was held to be unconstitutional as applied to him. The case is reported in the 40 Ct. Cl. 202, and the Court in the opinion on page 213 said:

"The subject-matter of its judgment never having been confided to it the Court was without jurisdiction and its judgment was void. The jurisdiction of a court can never depend upon its own decision upon the merits of a case brought before it, but upon its right to hear and decide at all."

In the same case the following language is used:

"If there is a total want of jurisdiction the proceedings are void and afford no justification when collaterally drawn in question."

In the case of In re Cuddy, 131 U. S. 280, 286, it is said:

"The judgment being attacked collaterally and the record disclosing a case of contempt and not showing one beyond the jurisdiction of the court, it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under Par. 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the writ, and upon proving such facts to have been discharged."

In Kilbourn v. Thompson, 103 U. S. 168, in the opinion at pages 197 and 198, the Court said:

"But we do not concede that the Houses of Congress possess this general power of punishment for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of the opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessity grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing, and the power omnipotent. The tendency of modern decisions everywhere is, to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry when the judgment is relied on in any other proceedings."

It would not contradict the record in the case in question to show that the petitioner was an Indian on whom the rights of citizenship had been conferred; but would show the trial court to have been without jurisdiction.

In the case of In re Mayfield, 141 U. S. 107, the petition alleged that "It was admitted upon the trial of the case that the evidence showed defendant to be one-fouth Indian by blood, and a citizen of the Cherokee tribe of Indians and that he was lawfully married to a white woman by blood; and that Mollie Phillips, with whom the crime of adultery was charged to have been

committed, was a white woman by blood, and that they both resided in the Illinois District of the Cherokee Nation, Indian Territory at the time of the commission of the offense." This Court there held that the facts stated were sufficient to show that the trial court had no jurisdiction of the subject-matter and that the judgment was void.

In the syllabus of the case of Thompson v. Whitman, 18 Wall. (U. S.) 457, it is said:

"By a law of New Jersey nonresidents were prohibited from raking clams and oysters in the waters of that state under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, on information given to hear and determine the case: Held, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure in New York not withstanding the record of a conviction was produced which stated that the seizure was made within such county."

In the case of Perry, Adm'r. v. St. Joe & W. Rld. Co., 29 Kan. 420, 423 in the opinion said:

"It is said that the probate court had jurisdiction to ascertain whether its judgment granting letters of administration is conclusive until revoked or reversed. Where the jurisdiction of a court is conceded, as a rule its judgment is conclusive of all matters involved; but if the jurisdiction be disproved, then the judgment is void for all purposes." . . . .

"Now the probate court of Doniphan county had

no authority to grant letters of administration unless the deceased left an estate in that county; and it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction, for this would be, to use the common expression, 'reasoning within a circle.' The probate court of that county we suppose assumed that the deceased had left an estate to be administered, and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective, than if the probate court of Doniphan county had granted letters of administration upon her estate when in fact she was not dead. In either case, the appointment of an administrator would be void for all purposes; and as in this case the jurisdiction of the probate court rests upon the fact of an estate bolonging to the deceased in Kansas, if the defendant can clearly show that the deceased died without leaving any estate of any kind, it must result that the entire proceedings before the probate court were without jurisdiction, and void."

In the case of Griffith v. Frazier, 8 Cranch. 23, in the opinion, this court said:

"To give the ordinary jurisdiction, a case, in which, by law, letters of administration may issue, must be brought before him. To the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead, the act, all will admit, is totally void.

Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint, with the character or powers of an administrator. The case, in truth, was not one within its jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

In the case of Scott v. McNeal, 154 U. S. 34, it is said:

"The appointment of an administrator for a person supposed to be deceased, but in fact living, is absolutely void and may be shown to be by evidence aliunde."

In the case of Thompson v. Tolmi, 2 Pet. (U. S.) 157, 163, it is said:

"If there is a total want of jurisdiction, the proceedings are void and a mere annulity and confer no right and affords no justification, and may be rejected when collaterally drawn in question."

In the case of Wise v. Withers, 3 Cranch (U. S). 331, 337, in the opinion the court said:

"It follows, from this opinion that a court-martial has no jurisdiction over a justice of the peace, as a militia-man; he could not be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, can not protect the officers who executes it."

In the foregoing case a citizen of the United States was tried before a Court-martial for failing and refusing to enroll as a militiaman and was fined and his property sold to satisfy the judgment, yet he was permitted in another action to show that he was not subject to military duty because he was a justice of the peace and as such was exempt from such service. The court held the judgment in said action to be void.

In the case of Rose v. Himley, 4 Cranch (U. S.) 241, 268, it is said:

"Upon principle, it would seem that the operation of every judgment must depend upon the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, the jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it cannot be contended that this condemnation operated a change of property."

In the case of Cooper v. Newell, 173 U. S. 555, it is said:

"In such case, evidence is admissable to contradict the recital in the judgment that the defendant was a citizen and resident of the state, and to show that he was not served with process and that the attorney who appeared for him had no authority to represent him."

In the case of Dow v. Johnson, 100 (U. S.) 158, in the fourth paragraph of the syllabus it is said:

"The District Court of Louisana—continued in existence after the military occupation of the State by the United States, and authorized by the commanding general to hear causes between parties—summoned a brigadier-general of the army of the United States to answer a petition filed therein, setting forth that the military company had, pursuant to his orders, siezed and carried off certian personal property of the plaintiff, who alleged that the seizure was unauthorized by the necessities of war, or martial law, or by the superiors of that officer. Judgment by default was rendered April 9th, 1893, against him for the value of the property. When sued in the Circuit Court of the United States, upon the judgment, he pleaded that the property was taken to supply the army. HELD, on demurrer to the plea, that the State Court had no jurisdiction of the cause of action and that the judgment was void."

It may be claimed that from the conduct of this petitioner he is estopped from showing the said judgment to be void. If the said Circuit Court had no jurisdiction of the subject-matter of the action, the acts and conduct of the petitioner could not give it jurisdiction. Jurisdiction can only be conferred by the sovereign authority which organizes the court. A void judgment cannot be the basis of an estoppel.

In the case of State v. Jennings, 24 Kan. 654, in the opinion, the Court said;

"A judgment rendered upon a void thing, would be virtually rendered upon nothing; it would be given without jurisdiction, and have nothing; to stand upon, would itself be void."

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In the case of Gruner v. The United States, 11 How. (U. S.) 163, this court said:

"It is true that there is an admission by the parties, as we have already stated, that the vessel was worth more than Two thousand dollars. And this admission would be evidence of the value where nothing to the contrary appeared in the record. But the consent or agreement of parties can not give jurisdiction to this court. Its appellate power is regulated and limited by law."

In the case of McKinnon et al, v. Hall, 50 Pac. 1052, it is said:

"The jurisdiction over the subject-matter of litigation cannot be conferred by consent of parties."

In the case of Cooper v. Reynolds, 10 Wall. (U. S.) 316, it is said:

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought, and this is conferred by a sovereign authority which organizes the court, and has to be sought for in the general nature of its powers, or in authority specially conferred."

In the case of Dicks v. Hatch, 10 Iowa, 380, it is said:

"The acts of the parties can confer upon the District Court no authority to hear and determine a subject matter of which the law gives it no jurisdiction."

Springer v. Shavender, 54, Am. St. Rep. 708.

In the case of Springer v. Shavender, 118, N. Car., 33, it is said:

"Nothing but a valid judgment will operate as an estoppel upon any one."

In the case of Savage v. Sternberg, 19 Wash. 679, it is said:

"A judgment is void and entirely worthless and no one is bound to obey it if the court pronouncing it had not jurisdiction over the subject-matter of the action or of the persons sought to be bound by it."

It may be contended that the petitioner should have appealed from the judgment and having failed to do so has lost his remedy. This is not the law. A judgment rendered by a court which has no jurisdiction of the subject-matter is void and can be impeached in any action in which it is drawn in question although not reversed.

In Elliott v. Piersol, 1 Pet. (U. S.) 328, it is said:

"Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether it decisions be correct, or otherwise, its judgment, until reversed, are regarded as binding in every other court. But if it act without authority it judgment and orders are regarded as nullities. They are not voidable but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal."

In the case of Wilcox v. Jackson, 13 Pet. (U. S.) 511, it is said:

"Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sus-

tainable would render that inquiry wholly unavailing. It is this—that the acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of pre-emption—that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any Court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this Court in the case of Elliott et al. v. Peirsol, et all., 1 Peters, 340, in these words: 'where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until, reversed is regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.' Now to apply this. Even assuming that the decision of the Register and Receiver in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so if a Court, whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance of a case be-

yond that sum."

If the indictment in question in this case had alleged that Toy Toy was an Indian to whom an allotment of land in severalty had been made and that he had received his preliminary patent therefor, the judgment would have been void upon its face and could have been questioned in this action. By a failure to allege the facts, the court cannot acquire jurisdiction.

In the case of Dicks v. Hatch, 10 Iowa 384, it is said:

"It may be considered that the District Court is a court of general jurisdiction, and its acts are presumed to be correct, but whilst this is true, the doctrine holds good, that when the record shows that the court had no jurisdiction over either the person or the subject-matter, the judgment is void and may be impeached either collaterally or in any other manner in which the question may arise."

In Murray v. American Surety Co. of N. Y., 10 Fed. 341, it is said:

"The exercise by a court, in a purely statutory proceeding, of a power not authorized by the statute, is null and void, and may be collaterally attacked."

It may be shown in this case that the said Act of Congress of March 3, 1885, is unconstitutional when applied to the facts in the case on which your petitioner is being held. An unconstitutional law confers no rights and affords no protection or justification to a party acting under it.

In the case of Ex Parte Nielson, 131 U. S. 176, 182, in the ~~syllabus~~ opinion, it is said:

"If the Court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus."

In the cases County Comm. v. K. C. Ft. S. & M. R. Co., 47 Pac. 327 and Morton v. Shelby & Co. 118 U. S. 441, it held, in effect, that an unconstitutional act is not a law. It confers no rights, affords no protection, and creates no office. It is in legal contemplation, as inoperative as though it had never been passed.

For all of the foregoing reasons, the United States Circuit Court in and for the Eastern Division of the state of Washington erred in refusing to make an order requiring the United States Marshall to show cause why this petitioner should not have been discharged. Said Court also erred in not issuing the writ as prayed for in the petition and discharging the petitioner.

Wherefore your petitioner prays that this Court make an order requiring the said Marshall to show cause why your petitioner should not be discharged, and that he be discharged.

F. T. WOODBURN,
AND A. E. CRANE,
Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 49.

TOY TOY, APPELLANT,

vs.

C. B. HOPKINS, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF OF PETITIONER.

F. T. WOODBURN,
A. E. CRANE,
Attorneys for Petitioner.

(20,637.)

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REPLY BRIEF OF PETITIONER.

In the brief filed on behalf of the United States there is a long statement of facts, which it is claimed exist, but is not in the record herein. It is our contention that if the Circuit Court of Oregon had no jurisdiction of the offense charged against Toy Toy, the judgment of the said court is void, and the acts of the parties can confer upon the district court no authority to hear and determine a subject-matter of which the law gives it no jurisdiction.

Dicks *v.* Hatch, 10 Ia., 380.
Cooper *v.* Reynolds, 10 Wall., 316.

The fact that the Supreme Court of Oregon made a mistake, and held that it had no jurisdiction of the offense charged against the petitioner, would not give the United States Circuit Court of Oregon jurisdiction of the offense. Jurisdiction cannot be acquired in that manner. The decision of the Supreme Court of Oregon, which is referred to

in the brief of the United States, was in line with all of the decisions of the courts, both State and Federal, prior to the time this court handed down its decision in the case of *In re* Heff, 197 U. S., 488. Since this court handed down its decision in said case all of the courts, both State and Federal (except the Circuit Court of Washington in this case), have acquiesced in it.

Upon the handing down of the said opinion by this court, Judge J. C. Pollock, United States district judge in and for the district of Kansas, made an order directing the United States marshal to release all persons held in custody for similar offenses. Since that time the State courts have assumed jurisdiction of all offenses committed by one Indian upon the person or property of another Indian.

Either the courts of the States are all acting without jurisdiction or the Circuit Court of Oregon had no jurisdiction of the offense charged against the petitioner. The power to punish a person for murder is clearly within the police powers of a State. This being true, an Indian who has become a citizen of the United States and of the State in which he resides is outside the reach of police regulations on the part of Congress.

In re Heff, 197 U. S., 488.
State *v.* Smokalen, 79 Pac., 603.
In re Now-Ge-Zhuck, 76 Pac., 877.

There is no difference in principle in this case and the Heff case. In said case, on page 509, this court said:

> "The District Court of Kansas did not have jurisdiction of the offense charged, and, therefore, the petitioner is entitled to his discharge from imprisonment."

This court discharged the petitioner in that case because the District Court of Kansas had no jurisdiction of the offense and for the reason the judgment was void. It was not erroneous and irregular, but it was void.

We concede that the writ of *habeas corpus* cannot be made to perform the functions of a writ of error. The five cases cited in the brief of the United States on page 5 are not in point.

1. In the case of *In re* Eckart, 166 U. S., 481, it was conceded that the trial court had jurisdiction of the offense and the defendant. The only matter complained of was the fact that the verdict did not specify the degree of murder the defendant was found guilty of. This was not jurisdictional.

2. In the case of Dimmick *v.* Thompson, 194 U. S., 540, 542, it was conceded that the court had jurisdiction of the offense and the defendant. The only matter complained of was the ruling of the court on the sufficiency of the indictment. This was not jurisdictional, and could only be remedied upon writ of error or appeal.

3. In the case of Riggins *v.* United States, 199 U. S., 547, this court said:

> "The writ of *habeas corpus* will not issue unless the court under whose warrant petitioner is held is without *jurisdiction,* nor can the writ be used merely to correct error."

The claim of the petitioner in this case is that the trial court had no jurisdiction of the offense.

The court further held that the writ would not be granted where there was a remedy by writ of error or appeal. This part of the opinion has no application to the facts in this case. The petitioner has neither remedy at this time. His failure to appeal would not give the court jurisdiction of the offense or make the judgment valid.

Elliott *v.* Persol, 1 Pet. (U. S.), 328.

Wilcox *v.* Jackson, 13 Pet. (U. S.), 511.

Hickey v Stewart, 3 How. 751, 762
Willidmson v Berry, 8 How. 495, 543
Latham v. Edgerton, 9 Cowen 229

4. In the case of Felts *v.* Murphy, 201 U. S., 123, it was conceded that the court had jurisdiction of the subject-matter and of the person. The matter complained of was the fact that the court failed to have the evidence repeated to the defendant through an ear-trumpet. This court expressly held in this case that its power in *habeas corpus* is limited to the question of jurisdiction.

5. The case of Valentina *v.* Mercer, 201 U. S., 131, follows the foregoing case, and is not adverse to the contention of the petitioner.

6. The case of *In re* Lincoln, 202 U. S., 178, is not in point in this case.

In that case the defendant's term of imprisonment had expired before the application for the writ was made to this court. He was being held to pay a fine of $100 and costs, and could have been shortly discharged by taking the poor debtor's oath. This court held that the case was practically a moot one and refused to entertain jurisdiction of it. This court further held that it should not be bothered with such petty questions.

In the case at bar the petitioner is in prison under a sentence for his natural life. He had lost his right of appeal long before the case of *In re* Heff was decided. The case of *In re* Lincoln was an original application for writ of *habeas corpus* to this court. We understand it is the policy of this court to refuse to issue a writ of *habeas corpus* when it is proper for an inferior court to do so (*Ex parte* Mirzan, 119 U. S., 584).

It is further suggested in the brief of the United States that Columbia George and Toy Toy presented a motion for leave to file an application for a writ of *habeas corpus*, which motion was denied. This ruling is surely not a bar to this

proceeding. The petitioner has never had his day in court. The only question presented by the record in this case is whether the Circuit Court of Washington erred in refusing to grant the writ.

The authorities cited in the brief of the petitioner from pages 13 to 21 are squarely in point that the court erred in making the ruling that it did. We particularly call the attention of this court to the following cases:

In re Cuddy, 131 U. S., 280.
In re Mayfield, 141 U. S., 107
In re Heff, 197 U. S., 488.

This court has held that a party need not appeal from a void judgment. (See authorities cited in brief of petitioner, pages 23 and 24.)

It is admitted in this case that the petitioner is an Indian, to whom an allotment of land in severalty had been made and a preliminary patent had been issued therefor prior to the commission of the offense. He was, therefore, a citizen of the United States and the State of Oregon at the time, and was subject to the laws, both civil and criminal, of said State. The foregoing facts bring this case squarely under the decision in the Heff case. If the indictment had contained the allegation that Toy Toy was an Indian to whom an allotment of land in severalty had been made, and that he was a citizen of the State of Oregon, the indictment would have shown on its face that the court had no jurisdiction of the offense. The failure of the indictment to allege these facts would not give the court jurisdiction.

The decision of the Circuit Court of Oregon that it had jurisdiction of the offense charged against Toy Toy would not give the court jurisdiction. He could have appealed from the decision, but his failure to do so would not make the judgment valid. The jurisdiction of a court can never depend upon its own decision upon the merits of a case

brought before it. The cases cited below fully sustain this contention.

Narciso Basso *v.* United States, 40 Ct. Cl., 213.
Perry Adm'r *v.* St. Joe & W. Rld. Co., 29 Kansas, 423.
Thompson *v.* Whitman, 18 Wall. (U. S.), 457.
Griffith *v.* Frazier, 8 Cranch, 23.
Wise *v.* Withers, 3 Cranch (U. S.), 331.
Rose *v.* Himley, 4 Cranch (U. S.), 341.
Dow *v.* Johnson, 100 (U. S.), 158.
In re Mayfield, 141 U. S., 107.
In re Cuddy, 131 U. S., 280.

For all of the foregoing reasons the judgment of the Circuit Court of Washington should be reversed as prayed for in the brief of the petitioner.

F. T. Woodburn and
A. E. Crane,
Attorneys for Petitioner.

Supreme Court, U. S.
FILED.
DEC 10 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 49.

TOY TOY, APPELLANT,

vs.

C. B. HOPKINS, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF WASHINGTON.

MEMORANDUM BY PETITIONER CITING ADDITIONAL AUTHORITIES.

F. T. WOODBURN,
A. E. CRANE,
Attorneys for Petitioner.

(20,637.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 49.

TOY TOY, APPELLANT,

v.

C. B. HOPKINS, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF WASHINGTON, APPELLEE.

Memorandum by the Petitioner Citing Additional Authorities.

A judgment is void when it is rendered by a court which is not empowered by the sovereign authority to take cognizance of the subject-matter it has decided. In the case of Rose *v.* Himely, 4 Cranch, 268, this court said:

> "This proposition certainly cannot be admitted in its full extent; a sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided could have no legal effect whatever."
>
> See main brief of petitioner, pages 22, 23.

In the case of Thompson *v.* Whitman, 18 Wall., 470, it is said:

> "From this it appears that the seizure must be made in a county, and that the case can only be

heard by justices of the county where it is made—two justices of the peace of the county where such seizures shall have been made. The seizure in this case, as specially found by the jury, was not made in Monmouth county; but the justices who tried the case were justices of that county. Consequently, the justices had no jurisdiction and the record had no validity."

See main brief of petitioner, pages 14 to 22.

The failure to appeal will not make the judgment valid. If a judgment is void for want of jurisdiction in the court rendering the judgment, over the subject-matter of the action, it may be questioned in any action in which the judgment is drawn in question.

In the case of Williamson *v.* Berry, 8 How., 495, 543, in the opinion this court said:

> "The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing and does not create a necessity for an appeal."
>
> Elliott *v.* Piersol, 1 Pet. (U. S.), 328.
> Wilcox *v.* Jackson, 13 Pet. (U. S.), 511.
> Hickey *v.* Stewart, 3 Howard, 751, 762.
> Latham *v.* Edgerton, 9 Cowen, 229.

In the case of Old Wayne Life Ass'n *v.* McDonough, 204 U. S., 16, it is said:

> "If it be once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force."

There is no limitation upon the right of a defendant to question a void judgment when he is imprisoned under it.

In nearly every State in the United States there is a limitation upon the right to question a judgment upon which there has been a sale of real estate. The case of United States *v.* Chandler-Dunbar Water Power Co., 209 U. S., 447, which is cited in the memorandum brief of the United States, is not in point, for the reason there is an express limitation upon the right to question the issuance of a patent. The purpose of this statute is to make the title of real estate more secure.

The Umatilla Indian reservation became extinct upon the allotment of the land therein in severalty to the members of the tribe.

State *v.* Smokalen, 79 Pac., 603.
Draper *v.* United States, 164 U. S., 246.
See main brief of petitioner, pages 11-12.

When the land was allotted to the Indians it ceased to be an Indian reservation, and was no longer a portion of the public domain set apart as the home of a tribe or tribes of Indians.

See main brief of petitioner, pages 10-11.

The United States Circuit Court of the State of Oregon had no jurisdiction to try a citizen of the State of Oregon for the commission of any offense upon said reservation.

In the case of the United States *v.* McBrantney, 104 U. S., 621, it is said:

> "The Circuit Court of the United States for the District of Colorado has no jurisdiction in the indictment against a white man for the murder of a white man within the Ute reservation in the State of Colorado."

The act of Congress of March 3, 1885 (23 Stat., 340), which provides for the allotment of land in severalty upon the Umatilla Indian reservation to the members of said tribe, nowhere refers to any agreement with said tribe that

the members thereof would not in the future become subject to the laws of the State of Oregon, nor is there any claim that there is such an agreement. The case of Dick *v.* United States, 208 U. S., 340, is not in point in this case.

In the case of the United States *v.* McBrantney, 104 U. S., 621, 623, this court said:

> "Whenever upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words."
>
> See Draper *v.* United States, 164 U. S., 242, 243.

The said act of Congress did not provide that said Indians should become citizens upon taking their allotments.

The act of Congress of February 8, 1887, contained this provision:

> "And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any *law* or *treaty* * * * is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens."

In the case of Guyatt *v.* Kautz, 83 Pac., 9, 12, it is said:

> "Indians who have received allotments under any other act of Congress are citizens."
>
> See main brief of petitioner, pages 6-8.

To give the court jurisdiction under the act of Congress of March 3, 1885 (23 Stat., 385), two things must concur:

First, there must be a tribal Indian;

Second, there must be an Indian reservation.

See main brief of petitioner, pages 5-6.

The jurisdiction of the Federal Government over these Indian tribes rests not upon the ownership of any sover-

eignty over the country in which they reside, but upon the fact that as wards of the General Government they are the subjects of Federal authority within the State. When the Indian ceases to be a tribal Indian, the Federal Government has no jurisdiction over him.

State *v.* Campbell, 55 N. W., 553, 555.
State *v.* Smokalen, 79 Pac., 603.
In re Now Ge-Zhuck, 76 Pac., 877.
In re Heff, 197 U. S., 488.

The act of Congress of February 8, 1887, is valid and repeals any provision of the act of Congress of March 3, 1885, which is inconsistent with it.

In the case of The Cherokee Tobacco, 11 Wallace, 616. it is said:

"An act of Congress may supersede a prior treaty."

For all of the foregoing reasons the judgment of the Circuit Court of Washington should be reversed.

F. T. WOODBURN AND
A. E. CRANE,
Attorneys for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

TOY TOY, APPELLANT,
v.
C. B. HOPKINS, UNITED STATES MARSHAL for the Western District of Washington. } No. 49.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from an order of the Circuit Court of the United States for the Western District of Washington, denying the application of Toy Toy, an Indian, for a writ of habeas corpus to determine the legality of his confinement under a judgment of conviction rendered upon an indictment returned in the Circuit Court of the United States for the District of Oregon, charging said Toy Toy, under section 5339 of the Revised Statutes of the United States, with the murder of one Annie Edna, an Indian woman, upon

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the Umatilla Indian Reservation in said State of Oregon. (R., 3, 4.)

It is proper to refer to the earlier history of the case not appearing in this record, but a matter of public record, in order that the court may be fully apprised of the steps appellant has hitherto taken to secure his liberty.

It appears that this appellant and Columbia George, both Indians, were jointly indicted in the state court in Oregon for the crime set out in the record here. They were separately tried and convicted and each sentenced to death. Columbia George, however, appealed from the judgment of conviction upon the ground, among others, that the state court was without jurisdiction, alleging that as the crime was committed by Indians upon an Indian it was therefore within the exclusive jurisdiction of the federal courts. In an exhaustive opinion the Supreme Court of the State of Oregon upheld this contention, and in reversing the judgment of the trial court ordered the discharge of the defendants. (39 Oregon, 127.) In consequence of this action by the state courts the defendants were thereupon indicted under section 5339 of the Revised Statutes of the United States in the Circuit Court of the United States for the District of Oregon, regularly tried and convicted of murder (without capital punishment), and sentenced to imprisonment for the term of their natural lives. (R., 3.)

At the October term, 1905, of this court these Indians, through their counsel, moved the court for leave to file a petition for a writ of habeas corpus, which

motion the court denied. (201 U. S., 641.) Shortly thereafter a petition for a writ of habeas corpus on behalf of Toy Toy only was filed in the Circuit Court of the United States for the Western District of Washington. (R., 1.) That court denied the petition, and the case is now before this court on appeal.

On the original application to this court for leave to file a petition for a writ of habeas corpus, counsel of George and Toy Toy (who have acted for them throughout all the proceedings in the state and federal courts) in their brief urged the following reason, among others, why this court should grant the writ:

> In this case no application for a writ of habeas corpus was made to the Circuit Court of the State of Washington, or the Circuit Court of Appeals of that district, but direct to this court. The Circuit Court has no jurisdiction to go behind the records, and it would have been useless to have had a hearing therein.

It thus appears that there has been—

(1) Indictment, trial, and conviction in the state court of Oregon.

(2) An appeal to the Supreme Court of that State from the judgment of conviction, upon the ground, among others, that the trial court was without jurisdiction since the crime was committed by Indians upon an Indian and jurisdiction was exclusively in the federal court. The State Supreme Court sustained this contention, and reversed the judgment of conviction.

(3) Following this refusal of the state courts to retain jurisdiction, the Indians were indicted, tried, and convicted in the Circuit Court of the United States for the District of Oregon, and sentenced to imprisonment for the term of their natural lives. After the lapse of four years, their counsel applied to this court for leave to file a petition for a writ of habeas corpus. Following this court's denial of the motion, counsel filed a petition for the writ in the Circuit Court of the United States for the Western District of Washington, although they had just previously argued before this court that the Circuit Court had no jurisdiction to entertain a petition based upon the same facts. This long course of trial and appeal is simply a persistent effort to thwart justice to the end that two doubly convicted criminals should go unpunished.

Briefly, the indictment in this case charged Columbia George and Toy Toy, Indians, with the murder of one Annie Edna, an Indian woman, upon the Umatilla Indian Reservation, within the State and District of Oregon. The record thus affirmatively shows that the United States Circuit Court for the District of Oregon, in which these Indians were last tried and convicted, had jurisdiction of the offense and of the defendants. If, as alleged in the petition for a writ of habeas corpus, these defendants had taken up separate allotments of land and had thus become citizens of the State of Oregon and therefore subject to its laws, criminal and civil, and the land upon which the offense was committed had ceased to

be Indian country, to wit, a part of the Umatilla Indian Reservation, such facts constituted a defense which the trial court was authorized to hear and pass upon. If it decided wrongfully, such error was open to review in the appellate court by writ of error. The defendants did not choose to pursue this course, but accepted that judgment as final. After a long period of delay, however, they now attempt to secure a correction of the alleged errors relied upon through a writ of habeas corpus. This court has repeatedly ruled that "the writ of habeas corpus can not be made to perform the functions of a writ of error." (*In re Eckart*, 166 U. S., 481, 485.)

To the same effect are:

Dimmick v. *Tompkins* (194 U. S., 540, 552).
Riggins v. *United States* (199 U. S., 547, 548).
Valentina v. *Mercer* (201 U. S., 131, 138).
Felts v. *Murphy* (201 U. S., 123, 129).
In re Lincoln (202 U. S., 178, 182).

The various proceedings instituted to secure the liberty of this appellant hardly reveal *bona fides*, and as "there is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure" (*Riggins* v. *United States*, 199 U. S., 547, 551), it is respectfully submitted that this appeal should be dismissed or the judgment below affirmed.

HENRY M. HOYT,
Solicitor-General.

OCTOBER, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

TOY TOY, APPELLANT,
v.
C. B. HOPKINS, UNITED STATES MARSHAL for the Western District of Washington. } No. 49.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

MEMORANDUM BY THE UNITED STATES, CITING ADDITIONAL AUTHORITIES.

As to dismissal of the appeal and the attempt to use the writ as a writ of error:

One argument opposed to this view of the writ here is that a void judgment may be impeached collaterally. The general rule is the other way. There are, it is true, certain exceptions, if there was no jurisdiction and the judgment was void. But those exceptions are not unlimited. For example, in *United States* v. *Chandler-Dunbar Water Power Co.* (209 U. S., 447) "it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away

the remedy, but validated the patent." (*State of Louisiana* v. *Garfield, Secretary, etc.*, opinion delivered November 9, 1908.) So here, the convictions in the state and federal courts have carried the fact of this crime into the region of fixed and established things beyond the power of the alleged defect of jurisdiction, raised years afterwards, to overthrow.

As to the merits: The decision in the Heff case must be considered in the light of the precise facts, and the court has shown no disposition to extend it. (*In re Lincoln, petitioner*, 202 U. S., 178.) Notwithstanding the *Heff* decision, Congress may retain control for police purposes over lands the Indian title to which is extinguished and which are allotted in severalty, although the Indians may be citizens and the lands within the limits of a State. That was the effect of the agreement with the Indians ratified by Congress, involved in *Dick* v. *United States* (208 U. S., 340). In this case I submit the same effect is produced by the act of May 3, 1885, "providing for allotment of lands in severalty to the Indians residing upon the Umatilla Reservation," etc. (23 Stat., 340). Notwithstanding the allotment, it was plainly the intention of Congress to maintain that reservation within the reduced limits, and to preserve the tribal relations in various important respects. The act was so construed in the case of *Columbia George*, codefendant with

Toy Toy before the supreme court of Oregon (39 Oreg., 127; see pp. 138–147).

The case of *United States* v. *Flournoy Live Stock & Real Estate Co.* (71 Fed., 576; 79 Fed., 886) is cited in that decision, which held that under similar circumstances relating to another reservation and different tribes, reservations continue to be Indian reservations notwithstanding the allotments in severalty, and that the tribal relation of the Indians has not been terminated.

The Supreme Court of Oregon in the *Columbia George* case specifically held that the allotments under the act of 1885 relating to the Umatilla Reservation did not work an abandonment or extinguishment of the reservation, and also held that the general allotment act of 1887 could not have this effect and was not repugnant to the special act and did not repeal it by implication.

I submit that the appeal should be dismissed, or the order denying the writ be affirmed.

HENRY M. HOYT,
Solicitor-General.

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